No. 92-7[illegible]

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1992

[illegible] M. SCHIRO,

Petitioner,

v.

[illegible]ARD CLARK,
Superintendent, Indiana
Indiana State Prison,
et. al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

---

REPLY BRIEF OF PETITIONER

Ira Mickenberg, Esq.
401 Broadway, Suite 711
New York, New York 10013
212/334-5289
Co-counsel

Monica Foster
Hammerle & Foster
500 Place
501 Indiana Ave. Suite 200
Indianapolis, IN 46202
317/630-0137
Counsel of Record

Cause No. 92-7549

IN THE SUPREME COURT

OF THE UNITED STATES

October Term 1992

THOMAS N. SCHIRO,

Petitioner,

v.

RICHARD CLARK,
Superintendent, Indiana
Indiana State Prison,
et. al.,

Respondents.

On Writ of Certiorari to the United States

Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONER

Ira Mickenberg, Esq.
401 Broadway, Suite 711
New York, New York 10013
212/334-5289
Co-counsel

Monica Foster
Hammerle & Foster
500 Place
501 Indiana Ave. Suite 200
Indianapolis, IN 46202
317/630-0137
Counsel of Record

Cause No. 92-7549

IN THE SUPREME COURT

OF THE UNITED STATES

October Term 1992

THOMAS N. SCHIRO,

Petitioner,

v.

RICHARD CLARK,
Superintendent, Indiana
Indiana State Prison,
et. al.,

Respondents.

On Writ of Certiorari to the United States

Court of Appeals for the Seventh Circuit

REPLY BRIEF OF PETITIONER

Ira Mickenberg, Esq.
401 Broadway, Suite 711
New York, New York 10013
212/334-5289
Co-counsel

Monica Foster
Hammerle & Foster
500 Place
501 Indiana Ave. Suite 200
Indianapolis, IN 46202
317/630-0137
Counsel of Record

TABLE OF CONTENTS

Table of Authorities.....ii

I. This Court Has Jurisdiction to Hear This Case.....1

II. This Court Should Grant the Writ On the Merits.....2

A. Under both state and federal law this jury's silence on one count amounted to an implicit acquittal.....3

1. The single case cited by Respondent in support of its state law proposition is not relevant.....3

2. The jury's silence on the *mens rea* murder and felony murder (criminal deviate conduct) constituted an acquittal.....5

a. Jackson.....6

b. "Acquittal" of the aggravating circumstance.....6

B. Jeopardy attaches before sentencing under state law.....8

1. Double jeopardy concerns may be implicated in a single proceeding.....8

2. Respondent incorrectly asserts that jeopardy attaches at sentencing.....9

C. Schiro has not waived his collateral estoppel claim and is entitled to relief under the doctrine....10

1. No waiver has taken place.....10

2. Collateral estoppel bars the death sentence...11

D. There are Important Reasons to Grant the Writ.....12

Appendix

Motion to Accept Petition for Rehearing In Banc Instanter..... A-1

TABLE OF AUTHORITIES

Cases: **Page**

Arizona v. Rumsey, 467 U.S. 203 (1984).....9

Bullington v. Missouri, 451 U.S. 430 (1981).....8, 9

Carpenters v. United States, 330 U.S. 395 (1947).....10

Cichos v. Indiana, 385 U.S. 76 (1976).....3, 4

Cichos v. State, 246 Ind. 680, 208 N.E.2d 685 (1965).....3

Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989), rhrg denied, 898 F.2d 160, cert. denied, 110 S.Ct. 2628.....7, 11

Fong Foo v. United States, 369 U.S. 141 (1962).....10

Green v. United States, 355 U.S. 184 (1957).....5, 9

Harris v. State, 508 N.E.2d 834 (Ind. App. 1987).....10

Poland v. Arizona, 476 U.S. 147 (1986).....5, 7

Sayles v. State, 513 N.E.2d 183 (Ind.App. 1986).....6

Schiro v. Clark, 963 F.2d 962 (7th Cir. 1992).....3, 10

Schiro v. State, 533 N.E.2d 1201 (1989).....4

Schiro v. State, 451 N.E.2d 1047 (Ind. 1983).....5

Tinker v. State, 549 N.E.2d 1065 (Ind.App. 1990).....8

Tison v. Arizona, 481 U.S. 137 (1987).....11

United States ex rel. Jackson v. Follette, 462 F.2d 1041 (2d Cir), cert. denied, 409 U.S. 1045 (1972).....5, 6

United States ex rel. Young v. Lane, 768 F.2d 834 (7th Cir. 1985).....7

United States v. Black, 733 F.2d 354 (5th Cir. 1984).....2

United States v. Martin Linen, 430 U.S. 564 (1977).....10

United States v. Raineri, 670 F.2d 702 (7th Cir. 1982).....2

Wilson v. Meyer, 665 F.2d 118 (7th Cir. 1981).....5

Other Authorities:

U.S. Sup. Ct. R. 10.1(a).....11

Indiana Code 35-42-1-1.....4

I. This Court has jurisdiction to hear this case

Respondent claims the Circuit Court lacked jurisdiction to permit Schiro to file his rehearing petition instanter and as such his Petition for Writ of Certiorari was due within 90 days of the panel opinion. It claims that the Circuit Court lacked jurisdiction to permit such filing because it did not specifically recall the mandate when it granted permission to file instanter and subsequently denied the rehearing petition on the merits. Brief in Opposition at 7-9.

This Court does have jurisdiction; the Petition for Writ of Certiorari was timely filed. The facts are:

1. The panel opinion was issued on May 8, 1992.

2. A motion to file rehearing instanter was tendered on August 18, 1992 and directed to be filed as of August 21, 1992.[1]

3. Permission to file the petition for rehearing instanter was granted on August 25, 1992.

4. The "instanter" petition for rehearing was denied on August 25, 1992.

See generally, Appendix 3a of Brief in Opposition.

The Circuit Court did not recall the mandate when it granted permission to file the rehearing instanter or when it denied the petition for rehearing. Only if the Circuit Court decided to *grant* the rehearing petition was it required to recall the mandate:

> Because the [government's] motion was made after our mandate issued, the district court found that jurisdic-

---

[1] Previous counsel filed the request to file the petition for rehearing instanter. In that pleading, counsel averred that he had appropriately mailed a timely petition for rehearing but that said mailing was never received by the Circuit Court. A copy of this motion is attached hereto as A-1.

> tion revested in it and that recall of our mandate was necessary to toll the Act. Under Fed.R.App.P. 41(a), a timely filing of a petition for rehearing stays the mandate until disposition of the petition. However, ***no reacquisition of appellate jurisdiction is needed to deny a petition for rehearing filed after the mandate has issued.*** *(citation omitted)* Although this court did not explicitly recall or stay the mandate, we had inherent power to do so. *(citations omitted)* ***Had we granted the government's petition, we would have recalled the mandate.*** *(citation omitted, emphasis added)*

United States v. Black, 733 F.2d 354 at 351 (5th Cir. 1984). See also United States v. Raineri, 670 F.2d 702, 719 (7th Cir. 1982).

Respondent confuses the difference between granting *permission* to file instanter with the granting of a belated petition for rehearing. Since the Circuit Court had jurisdiction to permit the filing of the rehearing petition instanter and deny the rehearing petition on its merits, it was not necessary for the court to recall the mandate. The Circuit Court had jurisdiction to consider the petition for rehearing and this Court has jurisdiction to hear Schiro's case. Schiro's instant petition was timely filed.[2]

II. This Court should grant the writ on the merits

Respondent concedes that a silent verdict generally constitutes an acquittal under state law, but claims an exception to the general rule bars relief. Brief in Opposition at 11. This concession is paramount to Schiro's double jeopardy claim.[3] The Circuit

[2] Interestingly, in its Brief in Opposition, Respondent claims that Schiro's instant petition was untimely -- yet it raises this "late filing" claim in a Brief which it filed six (6) weeks after the due date. Respondent's Brief was due on or before March 8, 1993; it was filed on April 22, 1993. It sought no extension of time.

[3] The failure of the state courts to consistently apply the rule of silent acquittals is an independent due process violation as argued in the Petition for Writ of Certiorari at 12.

Court held that Schiro's double jeopardy claim was without merit because, under state law, a silent verdict does not equal an acquittal for double jeopardy purposes:

> Since the jury's verdict did not amount to an acquittal under state law, the jury did not previously determine that Schiro did not intentionally murder Luebbehusen. Therefore, this double jeopardy claim must fail.

Schiro v. Clark, 963 F.2d 962, 970 (7th Cir. 1992).

Respondent now argues that relief is barred for four reasons:

> 1. Under both state and federal law, the jury's silence on one count did not amount to an acquittal because the multiple counts were charges of the same offense.
>
> 2. Under state law jeopardy does not attach until sentence is pronounced.
>
> 3. Schiro waived his collateral estoppel claim and is not entitled to relief on the merits.
>
> 4. This case fails to present a "cert. worthy" issue.

A. Under both state and federal law this jury's silence on one count amounted to an implicit acquittal

1. The single case cited by Respondent in support of its state law proposition is not relevant.

Respondent argues this case presents an exception to the general state rule that a jury's silence amounts to an acquittal because the rule does not apply when "multiple counts were merely different charges of the same offenses." Brief in Opposition at 11, quoting Cichos v. State, 246 Ind. 680, 208 N.E.2d 685 (1965), cert. dismissed as improvidently granted in Cichos v. Indiana, 385 U.S. 76 (1976).

Cichos was charged with reckless homicide and involuntary manslaughter. Both the state supreme court and this Court found

that these offenses required proof of the same elements to sustain a conviction. The only difference between the two was the penalty. Cichos was convicted of reckless homicide (the offense carrying the lesser punishment); the jury was silent on the manslaughter count. His conviction was reversed on appeal, he was retried on both counts and was reconvicted of reckless homicide. On appeal, Cichos argued that the jury's silence in the first trial on the manslaughter count constituted an acquittal of both counts, thus prohibiting retrial on either count.

The state supreme court rejected the jeopardy claim holding: (1) both crimes had the same elements and Cichos was convicted of one of them at the first trial; (2) the jury was specifically told that it should return only one verdict. This Court then stated: "In light of the Indiana statutory scheme and the rulings of the Indiana Supreme Court in this case, we cannot accept petitioner's assertions that the first jury acquitted him of the charge of involuntary manslaughter and that the second trial therefore placed him twice in jeopardy." Cichos v. Indiana, 385 U.S. 76, 80.

Unlike Cichos, the statutes at issue here define two separate and distinct offenses. The Indiana Supreme Court stated in Schiro's case: "[t]he crimes of murder and felony murder each contain elements that are different from the other but are equal in rank." Schiro v. State, 533 N.E.2d 1201, 1208 (1989).

The elements of murder and felony murder (I.C. 35-42-1-1) are:

Murder	***"Felony Murder"***
1. Knowingly or intentionally	1. *(No mental state required)*
2. Kills another person	2. Kills Another person
3. *(No proof of additional elements required)*	3. While committing or attempting to commit: arson, burglary, child molesting, criminal deviate conduct, kidnapping, rape or robbery.

Thus, the Indiana Supreme Court was correct when it held that each offense contains elements which the other does not.[4]

2. The jury's silence on the *mens rea* murder and felony murder (criminal deviate conduct) constituted an acquittal

Respondent asserts that pursuant to federal law "murder" and "felony murder" under I.C. 35-42-1-1(1) and (2) are not separate crimes, but are merely "different theories".[5] As noted above, "murder" and "felony murder" are separate crimes. In support, Respondent cites United States ex rel. Jackson v. Follette, 462 F.2d 1041 (2d Cir), cert. denied, 409 U.S. 1045 (1972). Respondent attempts to bolster this position, citing to Poland v. Arizona, 476

---

[4] Mens rea murder requires proof that the accused acted with an intent to kill, while felony murder does not require any intent to kill but does require proof that the person acted with the intent to commit the underlying felony. The felony murder offense additionally requires proof that the accused committed an underlying felony.

[5] Even if murder and felony murder are different theories of the same offense, Respondent's claim is unavailing. Green v. United States, 355 U.S. 184 (1957) (defendant entitled to relief where he was convicted of "malice murder" and jury was silent as to murder in course of felony even though both offenses brought under one count); Wilson v. Meyer, 665 F.2d 118 (7th Cir. 1981)(rejecting "different theories" of one offense as defense to double jeopardy claim).

As further support, Respondent contends that a single guilt phase verdict form listed all three charged counts. Brief of Opposition at 2. In fact, three separate "guilty" verdict forms were provided: one for each count. Schiro v. State, 451 N.E.2d 1047, 1062 (Ind. 1983).

U.S. 147 (1986), by claiming that one cannot be "acquitted" of a particular aggravating circumstance. Brief in Opposition at 13-15.

a. Jackson: Jackson has nothing to do with the issues at bar -- he was not "acquitted" on any charge. Jackson faced charges of premeditated and felony murder. His jury was told, without objection, that "if it returned a verdict on one count it was to remain silent on the other." Id. at 1043. At his first trial, he was convicted of premeditated murder. After a grant of *habeas corpus* relief, he was retried on both counts and found guilty of felony murder (the jury was again silent as to the premeditated murder). Double jeopardy did not bar his conviction for felony murder. There was no "acquittal" in trial one: the jury was instructed to return a single verdict -- there was no resolution of the factual predicates necessary to support a conviction for felony murder. The exact opposite is true here.[6]

b. "Acquittal" of the aggravating circumstance: Respondent claims that Schiro cannot be "acquitted" of the aggravating

[6] Each mental health professional who testified at trial, including Court's and State's experts, determined that Schiro suffered from a mental illness, although they generally disagreed as to the appropriate diagnosis and severity of the illness. From these facts, the jury could likely have concluded that the State failed to prove that Schiro "knowingly" killed. Regardless of the jury's reasoning for its verdict, "[t]he jury is the trier of fact and may attach whatever weight and credibility to the evidence which they believe is warranted." Sayles v. State, 513 N.E.2d 183, 188 (Ind.App. 1986). Given the verdict forms available to Schiro's jury, there was no other way for the jury to indicate that it found Schiro not guilty on the *mens rea* murder. See Schiro's Petition for Writ of Certiorari at 9-10.

A misstatement made by Respondent in its Brief in Opposition is relevant here. Respondent suggests that Schiro "attempted to fool the jury into thinking he was mentally disturbed by rocking in his chair whenever they were in the courtroom. The trial judge, who observed that this behavior stopped when the jury was out, was not fooled." Brief in Opposition at 2, n. 1. Through the testimony of numerous State's witnesses, the jury was informed that Schiro sometimes "rocked" and at other times did not [TR. 966, 993, 1087-88, 1109].

circumstance. It bases this claim on Poland, supra. Poland claimed that events occurring at his *sentencing* proceeding barred imposition of the death penalty.

Unlike Poland's case, the dispositive events here occurred at the *guilt phase*. It was at the *guilt phase* when the jury determined that Schiro was guilty of felony murder (rape) and not guilty of the *mens rea* murder and felony murder (criminal deviate conduct). It was the *guilt phase acquittals* that barred *further factual proceedings*.[7]

This distinction was addressed by the 11th Circuit in Delap v. Dugger, 890 F.2d 285 (11th Cir. 1989), *rhrg. den.*, 898 F.2d 160, *cert. den.*, 110 S.Ct. 2628. In Delap's first trial, he was convicted of a *mens rea* murder, but acquitted of felony murder. At resentencing, the jury was permitted to consider, in aggravation, that the murder was committed in the course of a felony. The sentencer found as aggravating that the crime "was committed while the defendant was engaged in the commission of a kidnapping, robbery and rape." Id. at 306. The 11th Circuit held:

> [I]n this case Delap's acquittal of felony murder occurred during the *guilt/innocence* phase of his first trial. Thus, we need not address what collateral estoppel effect, if any, would result had the jury at the sentencing phase of Delap's first trial concluded that he had not committed murder during the course of a felony. (footnote omitted) Here, we have a conclusive and final judgment in the *guilt/innocence* phase that Delap was not guilty of felony murder. Therefore, the concern of the

[7] "Cases such as Arizona v. Rumsey and United States v. Martin Linen Supply Co. demonstrate that 'acquittals' continue to receive a special degree of finality." United States ex rel. Young v. Lane, 768 F.2d 834, 841 (7th Cir. 1985).

> Poland Court that capital sentencing proceedings would be transformed into "minitrials" on each aggravating and mitigating factor (citation omitted), simply is irrelevant in this case, because the acquittal in question took place at the guilt/innocence phase of his first trial.

Id. at 318-319.

Like Delap, Schiro was acquitted of the aggravators at the guilt phase and the death sentence is barred.

B. Jeopardy attaches before sentencing under state law

Respondent claims that double jeopardy concerns are not implicated in bifurcated proceedings and that double jeopardy only applies to resentencings. Brief in Opposition at 12.

1. Double jeopardy concerns may be implicated in a single proceeding: Contrary to Respondent's claim, Indiana Courts have recognized double jeopardy claims arising from a single proceeding. In Tinker v. State, 549 N.E.2d 1065 (Ind.App. 1990), the defendant was charged with robbery, a Class B felony. The court convicted Tinker of robbery as a Class C felony. Before sentencing, the State asked the court to make additional fact findings and enter judgment of conviction for the charged class B felony. The court complied and sentenced Tinker on the class B. On appeal, the Court held that by finding Tinker guilty of the Class C felony it had acquitted on the Class B felony. "Therefore it is of no consequence whether T.R. 52(B) would allow the trial court to amend its judgment or that the amendment occurred before sentencing and entry of a final judgment because the result, under either alternative, violated Tinker's protection against double jeopardy." Id. at 1067.

Respondent argues that Bullington v. Missouri, 451 U.S. 430

(1981) and Arizona v. Rumsey, 467 U.S. 203 (1984) are limited to resentencing proceedings. Brief in Opposition at 12. It is true that both cases concerned whether resentencing proceedings could constitutionally be held. That is so, because in both cases the defendants were "acquitted" at the *penalty* phase. Respondent ignores the basis of those holdings; ie. that the penalty phase was "*itself a trial* on the issue of punishment...." Bullington at 439. Respondent states that the concerns of embarrassment, anxiety, and expense are not implicated by a first penalty phase. Respondent ignores the following from Bullington: "the 'embarrassment, expense and ordeal' and the 'anxiety and insecurity' faced by a defendant at the penalty phase of a Missouri capital murder trial surely are at least equivalent to that faced by any defendant at the guilt phase of a criminal trial." Id. at 446.

2. Respondent incorrectly asserts that jeopardy attaches at sentencing: Respondent contends that Schiro has overlooked "the settled principle that a judgment of conviction does not become final until the defendant is sentenced." Brief in Opposition at 12. The cases cited by Respondent concern when a conviction becomes final **for purposes of appeal** and are simply irrelevant. Green v. United States, supra at 188 ("it has been settled under the Fifth Amendment that a *verdict* of acquittal is final, ending a defendant's jeopardy and *even when 'not followed by any judgment*, is a bar to a subsequent prosecution...'" (citation omitted, emphasis added)

Clearly, the jury rendered its *verdict* at the close of the

guilt phase. The trial court would have had no authority to enter judgment of conviction on the counts for which the jury had remained silent and was likewise barred from proceeding to the penalty phase where the state was given a second opportunity to prove beyond a reasonable doubt that Schiro was guilty of those offenses. Fong Foo v. United States, 369 U.S. 141 (1962); Carpenters v. United States, 330 U.S. 395 (1947); Harris v. State, 508 N.E.2d 834 (Ind.App. 1987).

"[W]hat constitutes and 'acquittal' is not to be controlled by the form of the [factfinder's] action." United States v. Martin Linen Supply Co., 430 U.S. 564, 576 (1977) (other citations omitted). Rather, in determining what constitutes an "acquittal", this Court must look to "whether the ruling of the [factfinder], whatever its label, actually represents a resolution, correct or not, of some or all of the factual elements of the offense charged." Id.

C. Schiro has not waived his collateral estoppel claim and is entitled to relief under the doctrine

1. No waiver has taken place: Respondent contends that Schiro waived his collateral estoppel claim by not previously raising it. It correctly cites to a footnote in the Circuit Court opinion. Schiro v. Clark, 963 F.2d at 970, n. 7. However, this claim *has* been previously presented:

> The case proceeded to the guilt (sic) phase with the state given another opportunity to prove beyond a reasonable doubt that Schiro intentionally killed Laura Leubbeheusser (sic). Thereafter, the jury returned a unanamous (sic) verdict recommending against the imposition of the death penalty. As the Court is well aware, the trial judge overrode the jury's unanamous (sic)

> verdict against the death penalty and imposed a sentence of death. Schiro contends this was a violation of the double jeopardy prohibition. *This issue specifically contends that the doctrine of collateral estoppel was violated.*

Brief and Short Appendix of Appellant Thomas Schiro, filed in the Circuit Court on July 18, 1991, pg. 16 (emphasis added).[8]

2. Collateral estoppel bars the death sentence: Respondent argues that collateral estoppel does not bar imposition of the death penalty for two reasons: (1) the jury's consideration of whether Schiro knowingly killed did not include consideration of whether he intentionally killed; (2) the jury's verdict on guilt was not a "final judgment" because sentence had not yet been imposed. Brief in Opposition at 17.

The first argument was addressed in Schiro's Petition for Writ of Certiorari at 13-14. Regarding the second argument, Schiro incorporates his argument supra at p. 8. See also Delap, supra.[9]

D. There are Important Reasons to Grant the Writ

Respondent contends that this Court should not grant the writ and expend its limited resources to consider this case because it

---

[8] In its reply brief to the Circuit Court, Respondent did not claim that Schiro failed to previously raise the collateral estoppel claim. Indeed, such a claim would have been unavailing since Schiro has consistently pressed the doctrine of collateral estoppel as support for the claim presented herein.

In his brief to the Indiana Supreme Court concerning this issue, Schiro contended: "Because the accused was acquitted of the intentional killing of Luebbehusen, *the doctrine of collateral estoppel* barred the Court from proceeding to the second phase of the proceedings." Brief of Appellant, filed in the Indiana Supreme Court August 22, 1988, pp. 54-5 (emphasis added).

[9] At p. 17 of the Brief in Opposition, Respondent cites to Tison v. Arizona, 481 U.S. 137 (1987). Tison is totally irrelevant to Schiro's case: Tison addresses whether the 8th Amendment precludes imposition of the death penalty given the defendant's participation in the crime (ie. whether the defendant is "eligible" for the death penalty given his participation).

presents a unique set of facts for which there is no split among the lower courts. Recognizing the limited resources of this Court, Schiro respectfully urges this Court to accept certiorari. There is a split among the circuits on this issue. Delap, supra (habeas petitioner entitled to relief where at a prior trial he was acquitted of felony murder and sentencer relied upon felony murder as aggravating factor to support death sentence). The Circuit Court opinion in this case conflicts with Delap. Thus, Schiro has established an important consideration meriting review by this Court. U.S. Sup. Ct. R. 10.1(a).

Respectfully submitted,

Monica Foster
Counsel of Record

Monica Foster, Esq.
Hammerle and Foster
500 Place
501 Indiana Ave. Suite 200
Indianapolis, In. 46202-3199
317/630-0137

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
NO. 91-1509

THOMAS SCHIRO,	)	Appeal from the United States
	)	District Court for the Northern
Petitioner-Appellant,	)	District of Indiana,
	)	South Bend Division
v.	)	No. 83 C 588
	)	
RICHARD CLARK, Superintendent,	)	The Honorable
Indiana Attorney General,	)	Allen Sharp,
	)	Chief Judge.
Respondents-Appellees.	)	

MOTION TO ACCEPT PETITION FOR REHEARING IN BANC INSTANTER

Thomas Schiro, by counsel, moves this Court to accept his Petition for Rehearing In Banc Instanter. In order to sustain his request, Mr. Schiro presents the following:

1. That this Court entered its Judgment in the above-entitled cause on May 8, 1992.

2. Pursuant to Fed. R. App. P. 35 and 40, Mr. Schiro filed his Petition for Rehearing and Suggestion for Rehearing In Banc on May 22, 1992, by mail.

3. Through contact with the Clerk of this Court, counsel learned that the above Petition was not received. Counsel has been in constant contact with the Clerk of this Court.

4. On August 4, 1992, counsel was struck as a pedestrian by a motor vehicle, and sustained serious injuries, further delaying a second mailing of the Petition.

5. Because Mr. Schiro faces a sentence of death, and because the delay in the filing of his Petition for Rehearing is not attributable in any way to himself, Mr. Schiro respectfully requests that this Court accept his Petition for Rehearing and that his cause be reheard In Banc.

WHEREFORE, Thomas Schiro, prays that his Motion be sustained and for all additional appropriate relief.

Respectfully submitted,

Alex R. Voils, Jr.
Attorney for Appellant
110 N. Delaware Street
Indianapolis, IN 46204
(317) 638-2277
Attorney I.D. #1840-49

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was duly served upon the Attorney General's Office of the State of Indiana upon the date of filing same.

Alex R. Voils, Jr.